

What does a Bolsonaro Presidency mean for Brazilian Law? Part 1: Reforms from the Far Right

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1. An unexpected President

Jair Bolsonaro, an extreme right-wing former army officer who has spent the last 20 years as a representative in Congress, is at this point likely to be the next president of Brazil. In the first round of the election, he won more than 46% of the valid votes – against 29% of the runner-up, Fernando Haddad from the Workers' Party (PT) – after months of fueling and riding the wave of moral conservatism and anti-establishment dissatisfaction that swept the country. In this post and the next one, we will briefly sketch the potential implications of a Bolsonaro presidency for Brazilian constitutional law – the reforms he is most likely to enact, considering his very significant political and congressional support; how the Supreme Court will likely react to these reforms; and how Bolsonaro might position himself in scenarios of judicial or (unlikely) congressional resistance to his proposals.

Although Bolsonaro had been leading the polls for months, his campaign gained an unexpected momentum in the last weeks before election day, and especially after being stabbed, during a rally, by an independent, politically motivated attacker. In the last few years, Bolsonaro made a vast number of public statements considered to be homophobic (he said, for instance, [he rather have one of his sons die in an accident than come out as gay](#)); racist (he said one would not find japanese-brazilians “panhandling” because they are – [supposedly in contrast with Afro-Brazilians, in the context](#) – “not a shameless race”); and profoundly violent and/or misogynistic (in an argument with a member of Congress from the PT, [he shouted that she did not even “deserve” to be raped](#)). These are but a few examples. Throughout his long and controversial career as a fringe legislator, presenting himself as an outspoken tough-on-crime conservative and promoting the interests of the active and retired military and police officers, [he made many other statements along these lines](#).

Bolsonaro is a candidate with extreme views, [a very high level of rejection in polls](#), no support from the existing party system, and therefore almost no access to public campaign funding and TV time according to Brazilian electoral laws. Unsurprisingly, most political analysts had predicted that he would either not make it to the second round, or that he would do so just to suffer a resounding defeat against basically any other more mainstream contender. Moreover, in Brazil's system of “coalition presidentialism”, building a ruling coalition in the bi-cameral Congress is one of the main challenges of any would-be president. Even as Bolsonaro began to rise from a loud fringe politician to an actual potential contender for the 2018 elections, his ability to build such a coalition was recurrently challenged. He lacked both a party base

and the relevant experience, his positions were too far from the mainstream, and his overall populist, anti-establishment stance was considered to be too uncompromising for Brazil's complex machinery of coalition presidentialism. That is: even if he won the election, it was unclear whether he would be able to promote his agenda.

Things turned out very differently, however. Bolsonaro almost won in the first round of elections, and his party – Social Liberal Party (PSL) – won more than 11% of the total number of votes for the Chamber of Representatives, obtaining 52 seats. A number that is expected to increase by at least a dozen or so after internal rearrangements in Congress due to a newly enacted “*cláusula de desempenho*” (“performance clause”) meant to drive the extinction of the smallest parties in Brazil's hyper-fragmented political system. The largest party, for now, is still the Workers' Party, with 57 seats and around 10% of the total votes. Created in the early 80s and having held the Presidency for 14 years (2003-2016), the PT is arguably the most successful party in the country's democratic history. Nevertheless, [it took the PT almost two decades to obtain more than 50 seats in the Chamber](#). Bolsonaro's PSL, in contrast, although formally in existence for just a few years, was basically re-assembled – barely in time for the 2018 election – to serve simply as a vessel for his presidential bid. PSL had elected just one representative in 2014. As such, jumping to 52 is an unprecedented feat in Brazilian politics. [This new cadre of representatives has been elected mostly on the “coattails” of Bolsonaro's presidential campaign](#) – an effect that is not common in Brazilian politics, and that also benefited candidates from other parties who, although not formally participating in this electoral coalition, were able to associate themselves with Bolsonaro's views.

Moreover, many leading figures of the preceding decades of congressional politics have not made it through the ballots, most likely due to (in the public's eye) their association with the extremely unpopular Temer government and/or [involvement in corruption](#). There will be, then, a partial vacuum of leadership, experience, and collegiality across party lines in Congress. [The biggest relative losers in the election have been the center and center-right parties](#). While the PT and the parties further to the left have not been badly damaged, the once all-powerful center-right MDB (a mostly non-ideological, amorphous federation of local and regional leaders and networks that has been the main player in all ruling coalitions since 1993) [lost 32 of its 66 seats](#). The Brazilian Social Democracy Party (PSDB), also located near the center/center-right of the political spectrum, [lost 20 of its 49 seats](#).

The next Congress will be completely different from anything we have seen in Brazilian politics since 1989 (the first direct presidential elections after the dictatorship). [More than half of the current representatives were unable to secure reelection](#). The single largest part in the Chamber will be a new, *ideological* party, that has formed around Bolsonaro's campaign and radical right-wing discourse, and whose representatives are for the most part complete newcomers to politics (around half of them have never held office) who were pushed to office by the presidential candidate's coattails and soundbites. As [one political scientist wrote, “on Sunday night \[Brazilians\] watched the birth of a large right-wing party”](#). Against all odds and predictions, the once irrelevant PSL was reborn as the votes were counted, and some analysts already [speak of “bolsonarism” as a political movement](#).

Our system has been criticized due to clientelism, kickbacks, illegal campaign financing, and shady deals cutting across the political spectrum; other critics point to the exceedingly high costs of assembling a ruling coalition, which might impair the adoption of sound policies and even lead to instability. *Radicalism*, however, has never been an issue, and we will now have both a more radical president and a more radical Congress – both leaning sharply to the right. As the recent polls indicate that Bolsonaro is the most likely candidate to win, and considering the new – [more ideological, arguably more radical, and definitely more right-leaning](#) – shape of the Brazilian Congress, it is necessary to ask: would a future President Bolsonaro be able to turn his radical populist promises into a concrete reform agenda – and turn it into law? And, more specifically, are there constitutional limits in place that might be able to actually restrict what he is able to do?

2. What will Bolsonaro try to do?

Bolsonaro has developed his anti-establishment, conservative agenda in clear contrast with the legislative *status quo*. There is little reason to believe he will change his demeanor and his discourse once in office, and his challenges to the existing legal order will also express themselves in appointments to key cabinet positions – especially in the Ministries of Education, Health, and Justice. But many of his promises, which bear on many constitutionally sensitive issues, will have to be redeemed through legislative initiatives.

Among Bolsonaro's proposed policies, we single out four as (a) particularly likely to be enacted within the first year of his government, (b) particularly charged with symbolism to his supporters, (c) and posing relevant challenges for the Brazilian Supreme Court. They are: (1) the repeal of existing gun control legislation (the “disarmament statute” enacted by president Lula back in 2003); (ii) the lowering of the minimum age for criminal responsibility; (iii) the prohibition of “ideological discourse” in schools; (iv) and the legalization of the shooting of suspects by the police in circumstances beyond the scope of regular self-defense – which amounts, in practice, to legalized extrajudicial killings.

Repealing gun control

Bolsonaro has been one of the most prominent advocates for the right of Brazilian citizens to bear arms, and arming citizens has been his main proposal for reducing the country's high crime rates. Guns are a core element of his public *persona*, and making “finger-guns” when posing for pictures ([even with children](#)) has been a signature move in his presidential campaign.

Repealing the 2003 “disarmament statute”, then, is high in his political priorities, and such a measure will likely find substantive support in the newly elected right-wing Congress. There is no constitutional right to bear arms in Brazil, and gun control has been regulated through statutory law and executive decrees. Congress and the president have a large discretion in this area. Nevertheless, Brazilian courts commonly intervene in policy issues through arguments based on general constitutional principles. We can be sure that a legislative repeal of gun control laws

will be challenged before the Supreme Court, on the basis of the risks this poses to the right to life and public safety. Although it is unlikely that the Supreme Court will stand against the move towards deregulation in itself, it is possible that some Justices (maybe even a majority) might impose at least some partial limits on gun ownership and use.

Punishing younger people as adult criminals

The minimum age for criminal responsibility in Brazil is 18. There is a juvenile justice system in place for crimes committed by those between the ages of 12 and 18, with principles, possible punishments and sentencing limits that are different from the general criminal system ones. Demanding a lower age for criminal responsibility has been a pet issue for the right-wing, tough-on-crime, law & order politicians, and a high priority for a would-be President Bolsonaro. [Having initially proposed to set 16 years as the new minimum age, he has recently proposed 17 instead, as a kind of compromise.](#)

The age of 18 is explicitly set in the constitutional text, and changing it would require a constitutional amendment, which requires the support of three-fifths of the House of Representatives and the Federal Senate. Passing amendments, however, is perfectly within the realm of possibility for Bolsonaro. Most presidents who form a working coalition in Congress have no problem amending the constitution, and the Brazilian Constitution has been amended 99 times since 1988. In Bolsonaro's case, changing the minimum age for criminal responsibility should be particularly feasible, considering the right-wing wave that swept Congress. Two-thirds of the seats in the Senate were being disputed in this election, and a number of like-minded politicians, including his own son, have been elected to the Senate.

Judicial review of constitutional amendments, however, is a feature of Brazilian constitutional law. In particular, individual rights and guarantees are protected as “eternity clauses” in the Brazilian Constitution. Once again, we should expect the opposition to challenge such an amendment before the Supreme Court, arguing that the “age of 18” clause is, in itself, a fundamental right.

It is unlikely that the Court will declare such an amendment unconstitutional, but it is definitely within the realm of possibilities. A lot will depend specifically on the proposed lower age of liability – the more Bolsonaro tries to lower it below the current age of 18, the more some Justices (maybe even a majority) could find that the Constitution protects a “floor”, for the minimum age for criminal responsibility, as an eternity clause. In any case, the Brazilian Supreme Court is overall particularly active when dealing with criminal procedure rules, and dissenting opinions are to be expected whatever the specific details of Bolsonaro's reform.

Keeping “ideology” out of schools

“Cultural wars” in Brazil have focused largely on school children. Right-wing politicians accuse left-wing parties and professors of trying to indoctrinate the next generation, disregarding the beliefs and wishes of their parents.

Bolsonaro has gained prominence in these debates as a critic of government proposals to adopt, in schools, educational materials that are minimally sensitive to the existence of different sexual orientations – that he derogatorily labels the “gay-kit”. This strategy helped him gain the support of the increasingly relevant evangelical voters. A Bolsonaro presidency will surely be hostile to any such progressive measures, and, in Brazil, the Ministry of Education has large powers to regulate the curriculum on a national level, as well as in selecting which textbooks can be adopted by schools.

There is more at stake than banishing “progressive” material from schools, however. Regulating the speech of school teachers has become a central issue for conservatives. Beyond sexual education, [they have focused on topics in which they see the danger of “left-wing” indoctrination in general](#). History, specifically, is a particular area of concern for them, not only because of the inevitable “political” content involved but also because of the common stereotype, amongst Brazilian conservatives, that history teachers are all socialist or communist sympathizers.

Along these lines, conservatives have proposed laws forbidding teachers from promoting ideological preferences, and requiring them to present the different “versions, theories, opinions and perspectives” on anything they teach. This type of legislation, which has been defended under the banner [“school without parties”](#), is one of the key issues in the conservative political discourse in Brazil, and has been expressly defended many times by Bolsonaro himself.

Municipal and state legislation of the sort have been proposed over the last few years, and have actually been enacted in a few municipalities. A Bolsonaro presidency would mean the expansion of such laws. In their municipal and state iterations, this type of legislation faces challenges based on federalism issues (i.e., municipal and state legislative competence in the realm of education). In the case of a federal law, however, beyond a few dissenting opinions, it is unlikely that the Supreme Court would declare such a facially neutral legislation unconstitutional. Depending on the details of the statute, however, it is possible that the Court will invalidate certain aspects of it or establish limits for its concrete application.

“License to Kill”?

Bolsonaro and his supporters do not think that the notoriously lethal Brazilian police is lethal enough. They claim that current laws are too restrictive because they only allow police officers to shoot to kill in self-defense or only when citizens are under immediate danger. Bolsonaro has generally advocated for legislation making it harder to punish deaths that occur as a result of law enforcement operations. Different specific legislative proposals are mentioned regarding these ideas, but, regardless of how they are phrased, they are expected to be met with both popular and congressional support, making their enactment very likely.

However, and differently from the other policies we discussed above, in our view these reforms could be likely to be found unconstitutional by the Court. It will depend on how close they will come, in practice, to authorizing police officers to treat suspects as “enemy combatants”, and perhaps even to shoot them on sight. The

Constitution forbids capital punishment, except in the highly unlikely situation of war, and it is difficult to see how Brazilian constitutional law (not to mention international human rights treaties) could accommodate clauses that, in practice, come close to authorizing extra-judicial killings. But, considering popular and political support for all of Bolsonaro's policies on crime, this would pose a particularly difficult challenge for the Court. The Justices would have to choose between acquiescent silence, rubberstamping egregious legislation, or risking an all-out conflict with a populist President.

